



Billing Code 4410-30

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1240, and 1241

[EOIR Docket No. 164P; AG Order No. 3463-2014]

RIN 1125-AA62

List of Pro Bono Legal Service Providers for Aliens in Immigration Proceedings

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This rule proposes to amend 8 CFR parts 1003, 1240, and 1241 by changing the name of the “List of Free Legal Services Providers” to the “List of Pro Bono Legal Service Providers.” The rule also would enhance the eligibility requirements for organizations, private attorneys, and referral services to be included on the List of Pro Bono Legal Service Providers (List).

DATES: Electronic comments must be submitted and written comments must be postmarked on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER]. The electronic Federal Docket Management System at www.regulations.gov will accept electronic comments submitted prior to midnight Eastern Time at the end of that day.

ADDRESSES: Please submit written comments to Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia, 20530. To ensure proper handling, please reference RIN 1125-AA62 or EOIR docket number 164P on your correspondence. You may view an electronic version and provide comments via the Internet by using the www.regulations.gov comment form for this regulation. When submitting

comments electronically, you must include RIN 1125-AA62 in the subject box. See Section I of the SUPPLEMENTARY INFORMATION section for more information.

FOR FURTHER INFORMATION CONTACT: Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia, 20530, telephone (703) 305-0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation - Posting Of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at www.regulations.gov. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on www.regulations.gov.

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the "FOR FURTHER INFORMATION CONTACT" section. Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. Comments that will provide the most assistance to the Department of Justice will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support the recommended change.

For access to the electronic docket to read background documents or comments received, go to www.regulations.gov. Submitted comments may also be inspected at the Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 20530. To make an appointment, please contact EOIR at (703) 305-0470 (not a toll-free call).

II. Explanation of Proposed Changes

Aliens who are placed in removal proceedings pursuant to section 240 of the Immigration and Nationality Act (Act or INA), or who seek asylum under section 208 of the Act (whether or not in removal proceedings), must be provided with a list of persons who have indicated their availability to represent aliens on a pro bono basis. *See* INA 208(d)(4)(B) (relating to asylum proceedings), and INA 239(a)(1)(E), (b)(2) (relating to removal proceedings). In order to meet this statutory obligation, the Executive Office for Immigration Review (EOIR) publishes the Free Legal Services Providers List (List).¹ The regulations governing the List were promulgated

¹ EOIR, a component of the Department of Justice, includes the immigration judges and the Board of

on February 28, 1997, at 62 FR 9071, and are found at 8 CFR 1003.61-1003.65. The List is organized by immigration court location;² for each location, the List provides the names of private attorneys and non-profit organizations aliens in proceedings may contact for free legal services. At each location, aliens are given the portion of the List with the providers for that location. The complete List is posted on the EOIR website.³ See www.usdoj.gov/eoir/probono/states.htm.

The List is central to EOIR's efforts to improve the amount and quality of representation before its adjudicators, and it is an essential tool to inform aliens in proceedings before EOIR of available pro bono legal services. However, as explained further below, concerns have been expressed to EOIR by government sources and the public about problems with the List, and EOIR believes it is important to improve the functioning of the List. Therefore, the Department of Justice (Department) is proposing to amend the regulations governing the List, as described further below.

A. "Pro Bono Legal Service Providers"

As the List is intended to provide aliens access to pro bono representation, this proposed rule replaces the term "free legal service providers" with "pro bono legal service providers." Replacing the word "free" with the term "pro bono" reflects the relevant statutory language (*see*

Immigration Appeals. The immigration judges, who are appointed by the Attorney General, conduct removal proceedings and other immigration proceedings, resolving questions such as whether an alien is inadmissible to or deportable from the United States, and whether he or she qualifies for relief from removal.

² The term "immigration court location," as used in this proposed rule, refers both to the immigration courts and to facilities where hearings may be conducted, but where no EOIR personnel have a permanent duty station.

³ In addition, the Department of Homeland Security (DHS) provides a modified version of EOIR's List to asylum applicants before that agency, and DHS provides EOIR's List to aliens in certain other instances as well. As explained in more detail below, this proposed rule does not limit DHS's ability to provide aliens with EOIR's List or with DHS's modified versions of the List.

INA 208(d)(4)(B), 239(a)(1)(E), 239(b)(2)), describes more accurately the nature of the services provided, and will improve the integrity of the List. Further, removing the word “free” will clarify that entities and private attorneys on the List are not necessarily available to work free of charge for every alien regardless of the alien’s financial means or the type of legal work involved. Rather, use of the term “pro bono” indicates that such services are for the public good, *e.g.*, to help ensure qualified representation for those indigent aliens who do not have sufficient means to hire a private attorney.

B. Definition of “Pro Bono”

This proposed rule also sets forth a definition of the term “pro bono” to ensure that entities or private attorneys that want to be included on the List understand the kind of services expected from them if they are included on the List. The proposed rule defines “pro bono legal services” at § 1003.61(a)(2) as “those uncompensated legal services performed for indigent aliens or the public good without any expectation of either direct or indirect remuneration, including referral fees (other than filing fees or photocopying and mailing expenses), although a representative may be regularly compensated by the firm, organization, or pro bono referral service with which he or she is associated.” This definition not only reflects the spirit of pro bono representation, but is also consistent with the common law understanding of the terms *pro bono* and *pro bono publico*. *See, e.g.*, Black’s Law Dictionary (9th ed. 2009).

Use of the term *pro bono* indicates that work performed should be for the good of the public *from the outset* and a commitment to continue such representation throughout the duration of the administrative proceeding before an immigration judge. It is inappropriate for legal service providers to subsequently count as “pro bono” those services provided to paying clients who fall delinquent in paying attorney fees. In addition, EOIR recognizes that some

organizations charge reduced or nominal fees in an attempt to provide services to aliens who cannot afford private attorneys but have a modest ability to pay. However, services provided for a reduced or nominal fee do not constitute “pro bono” services under the proposed rule.

Although services provided for reduced or nominal fees are not “pro bono” services, organizations that charge such fees to some of their clients are not prohibited from inclusion on the List. As set forth in § 1003.62(a) and (b), such an organization can be included on the List if it provides a requisite amount of pro bono legal services and meets the other requirements for inclusion, even though it charges fees to some of its other clients.⁴

As the foregoing definition reflects, this proposed rule also adopts reference to “pro bono referral services” in place of the current reference to “bar associations.” There is no need to specifically list bar associations since any pro bono programs offered by them would either be in the form of a pro bono referral service or an organization that is eligible to be included on the List under proposed § 1003.62(a), (b), or (c). Adopting the term “pro bono referral services” also broadens eligibility for inclusion on the List to referral services that are not administered by a bar association.

C. Proposed Changes to Preserve the Integrity of the List

EOIR has strongly supported various local efforts to provide pro bono legal services to aliens appearing before the immigration judges, the Board of Immigration Appeals (Board), and the Office of the Chief Administrative Hearing Officer (which adjudicates certain immigration-related civil penalty actions). In April 2000, EOIR established a national pro bono program to

⁴ Under this proposed rule, an organization or attorney on the List must provide 50 hours of pro bono legal services per year in cases in front of each immigration court location on its application. *See* proposed §§ 1003.62, 1003.63. This requirement is discussed further below.

improve the development and coordination of these services and, in March 2008, EOIR issued formal policy guidance to immigration judges and immigration court staff on facilitating pro bono legal services. *See* “Office of Legal Access Programs,” www.usdoj.gov/eoir/probono/probono.htm; “Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services,” Mar. 10, 2008, www.usdoj.gov/eoir/efoia/ocij/oppm08/08-01.pdf (Last visited July 15, 2014).

EOIR encourages organizations and private attorneys to publicize their willingness to provide pro bono legal services to aliens appearing before immigration judges by being included on the List.⁵ The EOIR Committee on Pro Bono, which was formed in response to Directive 22 of Attorney General Alberto R. Gonzales’ “Measures to Improve the Immigration Courts and the Board of Immigration Appeals,” Aug. 9, 2006, <http://www.justice.gov/ag/readingroom/ag-080906.pdf> (Last visited July 15, 2014), reviewed issues and concerns regarding the need for additional safeguards for the List. In its recommendations to expand and improve EOIR’s pro bono programs, the EOIR Committee on Pro Bono (Committee) recommended that EOIR publish new regulations to strengthen the requirements for placing organizations and private attorneys on the List. *See* “EOIR to Expand and Improve Pro Bono Programs,” Nov. 15, 2007, www.usdoj.gov/eoir/press/07/ProBonoEOIRExpandsImprove.pdf (Last visited July 15, 2014). Specifically, the Committee recommended that private attorneys not be included on the List unless they could demonstrate their inability to provide pro bono legal services through or in

⁵ For aliens before the Board, EOIR helps to provide pro bono representation in appropriate cases through the BIA Pro Bono Project, which is administered by EOIR’s Office of Legal Access Programs. Based on criteria determined by partnering organizations, EOIR assists in identifying cases appropriate for pro bono representation. Partnering organizations then work to find pro bono representatives in those cases. Additional information is available at <http://www.justice.gov/eoir/probono/probono.htm#BIAProBono>.

association with local pro bono organizations or referral services. The Committee also recommended that the List be monitored periodically to ensure that listed organizations and individuals were indeed providing free legal services.

Since the creation of the List, EOIR has increasingly received complaints from numerous government sources and the public that certain private attorneys may be using the List to advertise or solicit for paying clients, and do not provide legal representation to a significant number of aliens on a pro bono basis or for any particular amount of time. For instance, a private attorney who has declared his or her willingness to represent indigent aliens on a pro bono basis may provide pro bono representation to only one alien and otherwise cease to provide pro bono representation. It is, unfortunately, common for aliens who contact private attorneys on the List to be informed that these attorneys are not available to accept any more pro bono cases, and are only available to represent the aliens for a fee. Though there may be different reasons why attorneys may find themselves unable to accept new pro bono cases at a particular time, there is reason for concern that at least some attorneys may not be using the List for its intended purpose and may be misleading EOIR, the public, and aliens as to their true willingness and availability to provide pro bono services.

EOIR has not received similar complaints regarding organizations or pro bono referral services on the List. This may be because, unlike private attorneys, organizations and pro bono referral services are primarily non-profit operations and are formed specifically to assist indigent and low-income individuals. Thus, although there may be similar potential for abuse, there is less incentive for such entities to use the List improperly. Further, attorneys and accredited representatives who provide pro bono services on behalf of organizations or referral services are typically supervised, unlike some private attorneys on the List.

Finally, the regulations do not currently require organizations or private attorneys who are included on the List to represent any minimum number of indigent aliens on a pro bono basis over a given period of time. Requiring “an attorney to accept a specific number or percentage of cases on a pro bono basis in order to be included on the list of free legal services providers” was considered in promulgating the 1997 rule. 62 FR 9072 (Feb. 28, 1997). At that time, EOIR determined that it was not necessary to include such a requirement. *Id.* However, the rule also stated that “this issue is subject to further review if necessary to eliminate any abuses.” *Id.*

The proposed rule seeks to prevent in five ways the potential for abuse by all organizations and private attorneys on the List, explained in greater detail below. First, the proposed rule requires that private attorneys on the List, and attorneys and accredited representatives providing pro bono legal services before EOIR on behalf of the organization on the List, not be subject to an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2). Second, the proposed rule provides that attorneys must seek to provide pro bono legal services through or in association with an organization or pro bono referral service if possible. Third, it requires every organization or individual on the List to provide a minimum of 50 pro bono hours a year in each immigration court location where the provider intends to be included on the List. Fourth, this proposed rule allows for and encourages public participation in the application process of an organization, referral service, or private attorney seeking to be included on the List. Finally, once a provider’s name is included on the List, the provider must declare under penalty of perjury every three years that the provider is qualified to remain on the List.

The following is a description of the five ways the proposed rule seeks to limit the potential for abuse by the organizations and private attorneys on the List.

1. Professional Conduct Standards

The new eligibility requirements aim to ensure that private attorneys on the List, and attorneys and accredited representatives who provide pro bono legal services for organizations on the List, satisfy EOIR's professional conduct standards.⁶

The proposed rule requires that private attorneys on the List, as well as attorneys and accredited representatives who provide pro bono services before EOIR on behalf of an organization on the List, not be subject to an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2). *See* proposed § 1003.62(a)(3) (pertaining to organizations recognized under § 1292.2), (b)(4) (pertaining to organizations not recognized under § 1292.2), (d)(1) (pertaining to attorneys). When applying to be included on the List, an attorney must submit a written declaration that he or she is not the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2). *See* proposed § 1003.63(d)(7). Similarly, an organization, whether or not recognized, must submit a written declaration that no attorney or accredited representative who will provide pro bono legal services on behalf of the organization before EOIR is the subject of such an order of disbarment or suspension.

Each of the declarations to be made by private attorneys under proposed § 1003.63(d), or organizations under proposed § 1003.63(b), must be made “under penalty of perjury.” Use of

⁶ The standards described in this footnote relate to compliance with EOIR's professional conduct standards. In addition, to be eligible for inclusion on the List, or to provide pro bono services before EOIR on behalf of an organization on the List, an attorney must comply with state bar association standards. Specifically, EOIR's regulatory definition of “attorney” states that an attorney cannot be “under any order suspending, enjoining, restraining, disbaring, or otherwise restricting him in the practice of law.” § 1001.1(f). This includes any such order issued by a state bar association. In an application to be included on the List, an attorney must declare, under penalty of perjury, “[t]hat he or she is not under any order suspending, enjoining, restraining, disbaring, or otherwise restricting him or her in the practice of law.” Proposed § 1003.63(d)(6). An organization must make such a declaration with respect to every attorney providing pro bono legal services before EOIR on the organization's behalf. Proposed § 1003.63(b)(2)(ii).

this term is consistent with language used in the declarations on Forms EOIR-28 (Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court) and EOIR-27 (Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals), which must be signed and filed each time an attorney or representative enters his or her appearance in a matter before the immigration judge or the Board. *See* § 1003.17(a) (requiring the filing of Form EOIR-28 with the immigration court); § 1003.2(g)(1) (requiring the filing of Form EOIR-27 with the Board); § 1003.3(a)(3) (same).

The proposed rule contains no requirement pertaining to other disciplinary actions. Such actions include public or private censure under 1003.101(a)(3) and admonition under § 1003.104(c). An attorney can be included on the List even if he or she was recently subject to such a disciplinary action, and an organization can be included on the List even if an attorney or accredited representative providing pro bono legal services on its behalf before EOIR was recently subject to such an action.

2. Ability to Provide Pro Bono Legal Services in Association with Organizations and Referral Services

The new eligibility requirements for private attorneys further aim to ensure that only those attorneys who are genuinely interested in and capable of providing pro bono services are included on the List.

Many immigration court locations are in areas with developed pro bono programs that are sufficiently capable of assessing the legal claims and financial resources (“intake” and “screening”) of large numbers of aliens in immigration proceedings and coordinating pro bono representation with local private attorneys. These programs often provide private attorneys with specialized legal training, ongoing mentoring, and other assistance in their pro bono cases as a

recruitment incentive. Thus, where sufficient local organizations or pro bono referral programs are available to identify aliens in need of pro bono legal services, as well as recruit and assist private attorneys interested in providing these services, private attorneys are able to provide pro bono services through or in association with such local organizations or referral programs. In such a situation, there is little to no need for private attorneys to be included by name on the List.

However, EOIR recognizes that in some instances, especially for immigration court locations in rural areas or small cities, private attorneys may be the only available and willing sources of pro bono legal services. For instance, some areas may have no pro bono organizations or may have organizations that lack programs to recruit and support pro bono attorneys. In addition, some pro bono organizations offer a limited range of immigration services, and do not offer referral programs for all types of cases before the immigration court.

The Department has designed the proposed rule to allow private attorneys in such circumstances to continue to be included on the List. Accordingly, this rule proposes to amend § 1003.62(d) to state that, to be included on the List, an individual attorney must demonstrate that he or she cannot provide pro bono legal services through or in association with an organization or referral service because: (i) such an organization or referral service is unavailable; or (ii) the range of services provided by the existing organization(s) or referral service(s) are insufficient to address the needs of the community. Under the “Applications” section at § 1003.63(d)(3), an attorney is further required to submit a written declaration that describes the good-faith efforts he or she made to provide pro bono legal services through an organization or pro bono referral service at each immigration court location where the private attorney is willing to provide pro bono legal services.

3. Minimum Requirement of 50 Pro Bono Hours Per Year

This rule proposes a new requirement that, once on the List, an attorney or organization perform at least 50 hours of pro bono legal services annually at each immigration court location where the attorney or organization intends to be included on the List. *See* proposed § 1003.62(a)(1), (b)(2), (d)(2). This requirement aims to ensure that only those organizations and private attorneys genuinely interested in providing pro bono services are included on the List. This requirement applies to organizations as well as private attorneys. As noted above, some organizations charge reduced or nominal fees in an attempt to provide services to aliens who cannot afford private attorney rates but have a modest ability to pay. However, services provided for a fee—even a nominal fee—are not pro bono services, and therefore do not count toward the 50-hour requirement. This requirement does not apply to pro bono referral services; there is no minimum annual amount of pro bono legal services that a referral service must provide.

Only pro bono legal services provided in cases before the immigration court location identified in the attorney's or organization's application count toward the 50-hour requirement. *See* proposed § 1003.63(a)(3), (b)(1), (d)(1). If an attorney or organization identifies more than one immigration court location, then the attorney or organization must provide at least 50 hours of pro bono legal services in cases before each location. For instance, a provider who seeks to be listed as providing pro bono services before the Arlington Immigration Court and the Baltimore Immigration Court must provide 50 hours of pro bono services before the Arlington Immigration Court and 50 hours of pro bono services before the Baltimore Immigration Court each year. This is intended to ensure, to the maximum extent possible, that attorneys and organizations listed as available to provide pro bono legal services at a particular immigration court location are

actually able to provide pro bono services at that location.⁷ However, a provider is not required to provide 50 hours of *in-court* pro bono service per year. Rather, all time spent providing pro bono legal services in cases before a particular immigration court location, including out-of-court preparation time, counts toward the 50-hour requirement.

Due to the new requirement that private attorneys must first seek to provide pro bono services through an organization or referral service, the Department does not believe that this 50-hour requirement will overly burden an individual attorney's ability to provide pro bono services. The individual attorney might commit to provide any number of pro bono hours through an organization or referral service on the List. An individual attorney associated with an organization on the List would not be required to provide 50 hours per year. Rather, the organization as a whole would commit to providing at least 50 hours of pro bono representation per year before each immigration court location identified in the organization's application.

This 50-hour annual minimum is intended to provide a clear measure of the amount of pro bono representation that is acceptable in order for an organization or private attorney to be qualified to be included on the List. A number of state bar associations and private law firms use 50 hours as the recommended annual minimum for pro bono work and this number is also found in the American Bar Association's (ABA) Model Rules of Professional Conduct.⁸ The Department believes this prevailing standard strikes the balance between private attorneys whose primary practice is the business of fee-generating clients but who are genuinely interested in

⁷ Pro bono legal services provided before the Board do not count toward the 50-hour requirement. As noted in footnote 5, EOIR assists in providing pro bono legal services in appropriate instances through the BIA Pro Bono Project.

⁸ ABA Rule 6.1 (Voluntary Pro Bono Publico Service) states that "[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."

providing pro bono services, and organizations that are primarily formed to assist indigent and low-income individuals. The proposed rule also provides that failure to provide the 50-hour annual minimum subjects attorneys and organizations to removal from the List under new § 1003.65.

The Department also recognizes, however, that a particular minimum may be burdensome for some or result in a de facto maximum standard that undermines the purpose of the List. Accordingly, the Department is soliciting comments on whether this 50-hour annual minimum is an acceptable measure of how much pro bono representation an organization or private attorney should provide in order to remain on the List. In particular, the Department welcomes comments on the following questions:

Question 1. Would a 50-hour annual minimum be too demanding for private attorneys who manage a fee-generating practice, but also want to engage in immigration-related pro bono work and cannot provide pro bono service through or in association with an organization or referral service?

Question 2. Conversely, is a 50-hour annual minimum not enough for organizations that seek to be included on the List?

Question 3. Should the standards for organizations and private attorneys differ from one another in any other way? For example, should the rule require that each attorney or accredited representative performing legal services on behalf of an organization perform a certain amount of pro bono work per year, as opposed to requiring that the organization as a whole perform a certain amount of work?

Question 4. Are there alternative standards that would be more appropriate measures of the level of pro bono representation that an organization or a private attorney should provide in

order to be included on the List, *e.g.*, the number of cases accepted or the types of cases accepted?

4. Continuing Certification

This proposed rule also would require at § 1003.64(b)(2) that, every three years from the date the application to be included on the List is approved, each provider must declare that the provider continues to be qualified to remain on the List under paragraphs (a), (b), (c), or (d) of § 1003.62. As part of the declaration, the provider must include alien registration numbers of clients in whose cases the provider rendered pro bono legal services under EOIR's regulations, representing at least 50 hours of pro bono legal services each year since the provider's most recent such declaration, or since the provider was included on the List, whichever was more recent. This continuing certification puts a reasonable responsibility on providers to keep EOIR informed of their willingness to provide pro bono legal services and their qualifications to be included on the List. The current rule provides no means by which EOIR remains informed that providers continue to provide pro bono legal services once their names are included on the List. Unless EOIR is specifically notified that a provider is no longer providing pro bono legal services, it is difficult for EOIR to ascertain whether a provider should remain on the List. Under the proposed rule, however, EOIR will remove a provider from the List at the next quarterly update if the provider fails to comply with the continuing certification requirement.⁹

For providers whose applications to be included on the List are approved before the date

⁹ As described further in section II-G of this preamble, a provider can be removed from the List in other circumstances as well. Specifically, as provided in § 1003.65, a provider may be removed if subject to automatic removal, if the provider submits a request for removal, if the provider fails to answer an EOIR inquiry in response to complaints, or if, following proceedings initiated by the EOIR Director, the EOIR Director determines that the provider is no longer qualified to remain on the List.

of publication of the final rule, a new application must be filed in compliance with the new qualification and eligibility requirements set forth in this rule as follows: organizations and pro bono referral services, within one year of the date of publication of the final rule; attorneys, within six months of the date of publication of the final rule. *See* proposed § 1003.63(e). These time periods strike a balance between allowing both providers and EOIR sufficient time to phase in these new requirements and addressing the public's need for an updated list of available, local pro bono legal service providers. The time period for attorneys is shorter than for organizations and pro bono referral services because, as noted above, the complaints EOIR has received primarily relate to attorneys. While the List already comprises well over 100 providers, the allotted time periods should be sufficient for these providers to reapply and be subject to the 15-day notice and comment period under § 1003.63(f).

5. Public Participation

Another means by which the proposed rule aims to improve the integrity of the List is by engaging the public in the application process under § 1003.63(f). The proposed rule requires EOIR to publicly post for a 15 day period the names of applicants, whether organizations, pro bono referral services, or individuals, who meet the regulatory requirements to provide pro bono services to aliens in proceedings in order to allow the public an opportunity to send comments to EOIR and the applicant. The names of applicants will be posted on EOIR's website, and may also be posted at the immigration court location where the applicant intends to provide pro bono services. Under the proposed rule, any individual or organization may forward its comments or recommendations for approval or disapproval of the publicly available applications to the Director. The rule will require that such comments also be served on the applicant so that the applicant has an opportunity to respond.

D. Improper Use of the List to Solicit or Advertise for Paying Clients

This proposed rule also states, at § 1003.65(d)(1)(iii), that a provider shall be removed from the List for improperly using the List for the primary purpose of soliciting, or advertising to, potential paying clients since doing so is clearly contrary to the List's intended purpose. Current regulations do not explicitly impose a removal requirement for use of the List for these purposes. Unfortunately, EOIR has received numerous complaints that aliens who contact private attorneys on the List are commonly informed that the private attorneys are not available to accept any pro bono cases and are only available to represent the aliens for a fee. As noted above, though there may be different reasons why attorneys are not able to accept additional pro bono cases at a particular time, this gives rise to concerns that at least some private attorneys may be using the List as free, government-supported advertising for fee-generating services. This may be misleading to aliens who would not have otherwise contacted the private attorney and who may also mistakenly believe that private attorneys on the List are in some manner endorsed by the government. These issues are of particular concern as aliens in immigration proceedings are often unfamiliar with the legal system in the United States and may have limited English proficiency.

Such practice not only degrades the integrity of the List, but may also violate § 1003.102(f)(1),¹⁰ state bar rules or the ABA's Model Rules of Professional Conduct.¹¹ Use of

¹⁰ Under § 1003.102(f), a practitioner is subject to disciplinary action by EOIR if he or she "[k]nowingly or with reckless disregard makes a false or misleading communication about his or her qualifications or services. A communication is false or misleading if it: (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. . . ."

¹¹ Most, if not all, states have a rule similar to ABA Model Rule 7.1 (Communications Concerning A Lawyer's Services), which states that: "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

the List by a private attorney to induce aliens into contacting the attorney for pro bono legal services when these are not commonly provided may also raise questions about whether such conduct might amount to impermissible solicitation by the private attorney for fee-generating legal services. Improperly soliciting clients is grounds for discipline under § 1003.102(d) and is prohibited by various state bar rules, and the ABA's Model Rules. In order to safeguard the integrity of the List and promote aliens' interests in obtaining pro bono legal services, § 1003.65(d)(1)(iii) of the proposed rule states that a provider is subject to removal from the List for improperly using it primarily to advertise for or solicit clients for compensated legal services. Additionally, § 1003.65(d)(5) states that removal from the list pursuant to § 1003.65(d)(1)(iii) shall be without prejudice to the authority to discipline an attorney or representative under EOIR's rules and procedures for professional conduct for practitioners listed in part 1003, subpart G.

E. Requesting Removal from the List

The Department recognizes that circumstances may arise where an individual attorney or organization on the List may legitimately be unable to continue accepting additional pro bono cases for a certain period, such as a full case load or reaching the annual limitation on pro bono hours by an attorney practicing in a law firm. In that instance, the provider can request removal from the List as set forth in § 1003.65(b)(1). Under § 1003.65(b)(2), any provider granted removal from the List may thereafter seek reinstatement upon written notice and submission of a new eligibility declaration, as specified in section 1003.63(b), (c), or (d). However, reinstatement, like initial inclusion, is subject to the discretion of the Director. Also, reinstatement will not affect the continuing qualification requirement set forth in §

1003.64(b)(2), which requires providers to submit a new declaration of eligibility every three years from the date of the original application's approval.

F. Available Services from the Pro Bono Provider

The proposed rule also requires at § 1003.63 that when applying to be included on the List, providers specify whether there are any limitations on the pro bono legal services they provide. Currently, § 1003.63 only requires the application to indicate whether a provider will represent “indigent aliens in immigration proceedings *pro bono*.” § 1003.63(d)(1)(ii). Yet, it is common practice for providers on the List to specify not only if they will represent aliens in specific types of proceedings (e.g., asylum, VAWA), but to state other limitations on the services they are willing to provide. For instance, some providers are unwilling to represent detained aliens. However, immigration court locations often use the same List for both detained and non-detained aliens, even though many providers on the List for a particular court are unwilling or unable to provide pro bono legal services to detained aliens. This practice can create confusion and unnecessary frustration for both detained aliens and the local court.

Accordingly, this proposed rule codifies the already existing practice of specifying any limitations that may exist on a provider's willingness to provide pro bono legal services. For example, if a provider only provides pro bono representation for asylum seekers, or does not represent aliens in detention, this must be specified. Sections 1003.65(d)(1)(i) and 1003.66 of the rule also subject a provider to removal from the List for failing to notify EOIR of any changes to these limitations. This rule will assist both EOIR in assembling the List for each immigration court location, as well as aliens in directing their search.

G. Removal of Providers from the List

The proposed rule transfers from the Chief Immigration Judge to the Director of EOIR

responsibility for maintaining the List, exercising authority and discretion to approve or deny an application, and removing a provider from the List. The Director may delegate such authority to any office or official within EOIR. *See* proposed § 1003.61(a)(1)(b).

Under the proposed rule, there are four ways a provider can be removed from the List.

First, under § 1003.65(a), an attorney can be automatically removed from the List if the Director determines that the attorney is the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2). Automatic removal applies only to private attorneys, and not to organizations or referral services.

Second, under § 1003.65(b), a provider can voluntarily request to be removed from the List.

Third, under § 1003.65(c), if EOIR receives complaints that a particular provider may no longer be providing pro bono services, EOIR can inquire, in writing, into the provider's pro bono practices. This will allow the provider to become aware of the receipt of complaints, and to provide an appropriate response. In appropriate cases, if in fact the provider is no longer in a position to provide pro bono services, the provider may request voluntary removal from the List. Where the provider fails to respond, EOIR may choose to remove the provider from the List.

Fourth, paragraph (d) of 1003.65 provides formal procedures for removing a provider from the List in circumstances not covered by paragraphs (a), (b), or (c) of that section. Under § 1003.65(d), the Director can initiate procedures to remove a provider from the List if the Director determines that a provider has: failed to comply with § 1003.66 (change in address or status), filed a false declaration in connection with an application filed pursuant to § 1003.63, improperly used the List primarily to advertise or solicit clients for compensated legal services, or failed to comply with any other requirements under subpart E.

If the Director decides to initiate procedures under § 1003.65(d), the Director must promptly inform the provider in writing of the Director’s intention to remove the provider from the List. The provider then has 30 days to submit a written response establishing, by clear and convincing evidence, that the provider continues to meet the qualifications for inclusion on the List. The response must include a declaration under penalty of perjury as to the provider’s continued compliance with the eligibility requirements, including individual examples of specific alien registration numbers of clients in whose cases the provider rendered pro bono legal services, representing at least 50 hours of service each year since the provider’s most recent declaration under § 1003.64(b)(2), or since the provider was included on the List, whichever was more recent. *See* proposed § 1003.65(d)(3). If the provider submits a response, the Director will consider the response before deciding whether to remove the provider from the List. *See* proposed § 1003.65(d)(4).

H. Additional Revisions

The proposed rule provides additional clarification by rearranging some of the sections and section headings. For instance, the proposed rule renames the heading of § 1003.62 as “Eligibility” (presently titled “Qualifications”), as the new heading better describes the requirements set forth in that section. Proposed new § 1003.61(c) (“Qualification”) sets forth the criteria that make an entity or individual “qualified” to be included on the List, including that the entity or individual meet the eligibility requirements under § 1003.62.

Moreover, the proposed rule specifies at § 1003.64(a) that the approval and denial of applications to be included on the List are discretionary determinations by the EOIR Director. The proposed rule also eliminates the right to appeal to the Board, as currently provided in § 1003.64 and § 1003.65(a), the denial of an application to be included on the List, as well as a

determination to remove a provider from the List. These changes are made for two reasons. First, the List is designed specifically to benefit aliens and not the providers listed. As application for placement on the List is completely voluntary and does not confer any rights or benefits to providers, there are no due process concerns with denying an application to be included on the List or removing a provider from the List. Second, applicants to be included on the List, as well as providers who are removed from the List, may reapply through the normal application process, or may seek reinstatement in the limited circumstance where the Director previously granted removal at the request of the person or organization, as set forth in § 1003.65(b)(2).

Finally, with regard to the denial of an application under § 1003.64 or a decision to remove a provider from the List under § 1003.65, the proposed rule states that when serving documents on an applicant, the Director shall comply with the definition of “service” in § 1003.13.

I. Proceedings before the Department of Homeland Security

As noted above, section 208(d)(4)(B) of the Act requires that asylum applicants be provided “a list of persons . . . who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.” For aliens in asylum proceedings before the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), USCIS currently complies with this requirement by providing a modified version of EOIR’s List. Specifically, USCIS reorganizes EOIR’s List around the geographic area served by each of USCIS’s eight asylum offices; the providers in the area served by each office are listed under that office. Separately, U.S. Immigration and Customs Enforcement (ICE) with DHS provides EOIR’s List to aliens subject to expedited removal as aggravated felons who are not lawful

permanent residents, and in certain instances involving detained juveniles. *See* §§ 236.3(g) (detained juveniles), 238.1(b)(2)(iv) (expedited removal).

The new requirements of this proposed rule are focused solely on pro bono providers who wish to be included on EOIR's List because they are providing pro bono legal services before the immigration courts; these requirements and limitations are not intended to account for pro bono representation of aliens before DHS.

Thus, this proposed rule does not limit whether and how pro bono providers may represent aliens before DHS, nor does it limit how DHS notifies aliens of the availability of pro bono legal services. Under this proposed rule, DHS can continue to provide EOIR's List to aliens who are in proceedings before DHS, and can continue to modify the List as DHS deems appropriate. As explained above, under the proposed rule, only pro bono services in cases before EOIR, specifically at the immigration court location or locations identified in a provider's application, will count toward the 50-hour annual requirement. This is to ensure, as much as possible, that pro bono providers listed for a particular immigration court location are actually available to provide pro bono services there. But the 50-hour annual requirement under this proposed rule does not apply with respect to providing pro bono services before DHS. Thus, in modifying EOIR's List, if DHS wishes to add providers EOIR did not include – for example, those who practice exclusively or mostly before DHS – then DHS may do so. EOIR recognizes the importance of its List in assisting DHS to notify aliens of pro bono legal service providers. The Department believes that this proposed rule is appropriate in that it responds to concerns regarding pro bono representation before EOIR, while not limiting DHS's ability to modify EOIR's List as it chooses, or otherwise to inform aliens of pro bono legal service providers in the manner DHS deems best.

III. Regulatory Requirements

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. Some small entities, such as non-profit organizations or small law offices, will be affected by this rule. Organizations or private attorneys may be removed from the List of Pro Bono Legal Service Providers if they are no longer qualified to be on the List under this proposed rule. Likewise, those who wish to have their names included on this List will be affected as they will have to demonstrate their eligibility to have their names listed. However, application for placement on the List is completely voluntary and does not confer any rights or benefits on such organizations or law offices. Placement on the List does not constitute government endorsement of a particular entity or private attorney; nor is the List to be used for advertising or soliciting. Rather, the purpose of the List is to provide aliens notification that these entities or private attorneys are available to provide uncompensated legal services without any direct or indirect remuneration (other than filing fees or photocopying and mailing expenses).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year and also will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1535).

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)

The Department has determined that this rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and, therefore, it has not been reviewed by the Office of Management and Budget. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Additionally, it calls on each agency to periodically review its existing regulations and determine whether any should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving its regulatory objectives.

This rule affects the function and purpose of the Pro Bono Service Provider List. The benefits of this proposed rule include addressing long-standing problems of abuse associated with the existing List, updating the term “free” with “pro bono” legal services to reflect the

proper statutory language, creating a minimum number of annual pro bono hours to ensure proper compliance with the spirit of the regulation, and creating greater agency flexibility to remove List participants who do not meet the minimum regulatory requirements. Further, the rule is intended to provide aliens with better information regarding the availability of pro bono representation before the immigration courts, thus benefitting aliens who appear in proceedings before the courts.

Burdens to the public are applicable only to attorneys and organizations making a voluntary decision to seek to be included on the list; these include requirements to apply for inclusion on the List, maintain updated contact information, perform a minimum of 50 annual pro bono hours of service at each immigration court location where the attorney or organization intends to be included on the List, and file a declaration every three years of continuing eligibility to be on the List. The regulations provide for removal from the List of a provider who can no longer meet the requirements of inclusion on the List. The Department examined these burdens to the public and has determined that the benefits outweigh the burdens. The Department believes that this rule will have a minimal economic impact on List participants because it provides List participants with flexible means of complying with the rule's requirements. Further, it will not have a substantial economic impact on Department functions, as the Department is already maintaining and updating such a List quarterly. The Department believes this rule will have a positive economic impact for aliens in proceedings before EOIR who need legal services, as the rule is intended to preserve the integrity of the List and ensure that providers on the List are actually available to provide pro bono legal services.

Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The Department of Justice, Executive Office for Immigration Review (EOIR), is submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with review procedures of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320. The information collection is published to obtain comments from the public and affected agencies. Written comments and suggestions are encouraged and will be accepted for 60 days. If you have comments on the estimated public burden, associated response time, or suggestions, please contact EOIR as noted above.

Comments that will provide the most assistance will evaluate: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) whether the proposed collection of information enhances the quality, utility, and clarity of the information to be collected; (3) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; and (4) whether the burden of

the collection of information on those who are to respond can be minimized through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of information.

There is currently no specific form or information collection instrument associated with this request.¹² Rather, this rule implements new eligibility and application requirements in order for an organization, pro bono referral service, or private attorney to be included on the List of Free Legal Services Providers (to be renamed, through this rule, the “List of Pro Bono Legal Service Providers”). Organizations and private attorneys that file an application (for which no specific form is currently required) with EOIR to be included on the List must demonstrate that they provide, or plan to provide, a minimum of 50 hours per year of pro bono legal services at each immigration court location where they intend to be included on the List. Entities and individuals must indicate “their availability to represent aliens in asylum proceedings on a pro bono basis” (*see* INA 208(d)(4)(B)) and “their availability to represent pro bono aliens in proceedings under section 240” (*see* INA 239(b)(2)). They must also indicate whether there are any limitations on the services they plan to provide and in which immigration court locations they plan to provide such services. Private attorneys must demonstrate that they cannot otherwise provide such services through an organization or pro bono referral service. Finally, all providers must file a declaration every three years that they remain eligible to be on the List.

As explained in this proposed rule, these additional requirements will enhance the integrity of the List by ensuring that only those who genuinely intend to provide pro bono services are included on the List. These requirements will benefit aliens in need of pro bono

¹² The Department contemplates implementing an electronic/Internet-based system in the future that may facilitate the collection of information.

legal services and will also prevent the use of the List primarily for improper solicitation and advertisement with respect to potential clients for paid legal services. It is not mandatory for organizations, pro bono referral services, or private attorneys to be included on the List in order to represent aliens on a pro bono basis before EOIR. Placement on the List is completely voluntary and does not confer any rights or benefits on entities or individuals who are included on the List. Placement on the List in no way constitutes government endorsement of a particular entity or private attorney, nor is the List to be used for advertising or soliciting. Rather, the purpose of the List is to provide aliens notification that these entities or private attorneys are available to provide legal services without any direct or indirect remuneration (other than filing fees or photocopying and mailing expenses).

EOIR currently uses appropriate information technology to reduce burden and improve data quality, agency efficiency, and responsiveness to the public. Under this proposed rule, EOIR would continue to do so to the maximum extent practicable. EOIR will collect the information for any person or entity seeking to be included on EOIR's List of Free Legal Services Providers (to be renamed the "List of Pro Bono Legal Service Providers"). Under the current regulation, it is estimated that it takes a total of 17 hours annually to provide the required information (50 applicants per year at 20 minutes per application). Under the proposed rule, it is estimated that 129 applicants will file applications each year for the first two years (phase-in period) and take an average of 30 minutes for each application, resulting in an estimated total of 65 hours each year. After the first two years, it is estimated that there will be 93 applicants per year, expending an average of 30 minutes for each application, resulting in an estimated total of 47 hours each year. This would be an increase from the current estimated annual hours by 48 hours annually for the two-year phase-in period and 30 hours annually for the succeeding years.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organizations and functions (Government agencies).

8 CFR Part 1240

Administrative practice and procedure, Aliens.

8 CFR Part 1241

Administrative practice and procedure, Aliens, Immigration.

Accordingly, for the reasons stated in the preamble, the Attorney General proposes amending parts 1003, 1240, and 1241 of chapter V of title 8 of the Code of Federal Regulations as follows:

PART 1003 - EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

2. Amend § 1003.1 by removing and reserving paragraph (b)(11).

3. Revise the heading for subpart E to read as follows:

Subpart E—List of Pro Bono Legal Service Providers

4. Revise § 1003.61 to read as follows:

:

§ 1003.61 General provisions.

(a) Definitions.

(1) *Director.* Director means the Director of the Executive Office for Immigration Review (EOIR), pursuant to 8 CFR 1001.1(o), and shall also include any office or official within EOIR to whom the Director delegates authority with respect to subpart E of this part.

(2) *Pro bono legal services.* Pro bono legal services are those uncompensated legal services performed for indigent aliens or the public good without any expectation of either direct or indirect remuneration, including referral fees (other than filing fees or photocopying and mailing expenses), although a representative may be regularly compensated by the firm, organization, or pro bono referral service with which he or she is associated.

(3) *Organization.* A non-profit religious, charitable, social service, or similar group established in the United States.

(4) *Pro bono referral service.* A referral service, offered by a non-profit group, association, or similar organization established in the United States that assists persons in locating pro bono representation by making case referrals to attorneys or organizations that are available to provide pro bono representation.

(5) *Provider.* Any organization, pro bono referral service, or attorney whose name is included on the List of Pro Bono Legal Service Providers.

(b) Authority. The Director shall maintain a list, known as the List of Pro Bono Legal Service Providers (List), of organizations, pro bono referral services, and attorneys qualified under this subpart to provide pro bono legal services in immigration proceedings. The List,

which shall be updated not less than quarterly, shall be provided to aliens in removal and other proceedings before an immigration court.

(c) *Qualification.* An organization, pro bono referral service, or attorney qualifies to be included on the List if the eligibility requirements under § 1003.62 and the application procedures under § 1003.63 are met.

(d) *Organizations.* Approval of an organization's application to be included on the List under this subpart is not equivalent to recognition under § 1292.2 of this chapter. Recognition under § 1292.2 of this chapter does not constitute a successful application for purposes of the List.

5. Revise § 1003.62 to read as follows:

§ 1003.62 Eligibility.

(a) *Organizations recognized under § 1292.2.* An organization that is recognized under § 1292.2 of this chapter is eligible to apply to have its name included on the List if:

(1) The organization will provide a minimum of 50 hours per year of pro bono legal services to aliens at each immigration court location where the organization intends to be included on the List, in cases where an attorney or representative of the organization files a Form EOIR-28 Notice of Entry of Appearance as Attorney or Representative before the Immigration Court (EOIR-28 Notice of Entry of Appearance);

(2) The organization has on its staff at least one attorney, as defined in § 1292.1(a)(1) of this chapter, or at least one accredited representative, as defined in § 1292.1(a)(4) of this chapter; and

(3) No attorney or accredited representative who will provide pro bono legal services on

the organization's behalf before EOIR is the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2).

(b) *Organizations not recognized under § 1292.2.* An organization that is not recognized under § 1292.2 of this chapter is eligible to apply to have its name included on the List if:

(1) The organization is established in the United States;

(2) The organization will provide a minimum of 50 hours per year of pro bono legal services to aliens at each immigration court location where the organization intends to be included on the List, in cases where an attorney of the organization files a Form EOIR-28 Notice of Entry of Appearance;

(3) The organization has on its staff at least one attorney, as defined in §1292.1(a)(1) of this chapter; and

(4) No attorney who will provide pro bono legal services on the organization's behalf before EOIR is the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2).

(c) *Pro bono referral services.* A referral service is eligible to apply to have its name included on the List at each immigration court location where the referral service either refers or plans to refer cases to attorneys or organizations that will provide pro bono legal services to aliens in proceedings before an immigration judge.

(d) *Attorneys.* An attorney, as defined in §1292.1(a)(1) of this chapter, is eligible to apply to have his or her name included on the List if the attorney:

(1) Is not the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2);

(2) Will provide a minimum of 50 hours per year of pro bono legal services to aliens at

each immigration court location where the attorney intends to be included on the List, in cases where he or she files a Form EOIR-28 Notice of Entry of Appearance; and

(3) Cannot provide pro bono legal services through or in association with an organization or pro bono referral service described in paragraph (a), (b), or (c) of this section because:

(i) Such an organization or referral service is unavailable; or

(ii) The range of services provided by an available organization(s) or referral service(s) are insufficient to address the needs of the community.

6. Revise § 1003.63 to read as follows:

§ 1003.63 Applications.

(a) *Generally.* A form is not required in order to apply to be included on the List. To be included on the List, any organization, pro bono referral service, or attorney that is eligible under § 1003.62 to apply to be included on the List must file an application with the Director.

Applications must be submitted in writing and received by the Director at least 60 days in advance of the quarterly update in order to be considered. The application must:

(1) Establish by clear and convincing evidence that the applicant qualifies to be on the List pursuant to § 1003.61(c);

(2) Specify how the organization, pro bono referral service, or attorney wants its name to be set forth on the List;

(3) Identify each immigration court location where the organization, pro bono referral service, or attorney provides, or plans to provide, pro bono legal services;

(4) Include on the envelope the notation “Application for List of Pro Bono Legal Service Providers”; and

(5) Include proof of service, as defined in § 1003.13, on the court administrator for each

immigration court location where the organization, pro bono referral service, or attorney will provide pro bono legal services.

(b) *Organizations.* An organization, whether recognized or not under § 1292.2, must submit with its application a declaration signed by an authorized officer of the organization that states under penalty of perjury:

(1) That it will provide annually at least 50 hours of pro bono legal services to aliens in removal or other proceedings before each immigration court location identified in its application;

(2) That every attorney who will provide pro bono legal services before EOIR on behalf of the organization:

(i) is eligible to practice law in and is a member in good standing of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia; and

(ii) is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law;

(3) That no attorney or accredited representative who will provide pro bono legal services before EOIR on behalf of the organization is the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2); and,

(4) Any specific limitations it has in providing pro bono legal services (e.g., not available to assist detained aliens or aliens with criminal convictions, or available for asylum cases only).

(c) *Pro bono referral services.* A pro bono referral service must submit with its application a declaration signed by an authorized officer of the referral service that states under penalty of perjury:

(1) That it will offer its referral services to aliens in removal or other proceedings before

each immigration court location identified in its application; and,

(2) Any specific limitations it has in providing its pro bono referral services (e.g., not available to assist detained aliens or aliens with criminal convictions, or available only for asylum cases only).

(d) *Attorneys.* An attorney must submit with his or her application a declaration that states under penalty of perjury:

(1) That he or she will provide annually at least 50 hours of pro bono legal services to aliens in removal or other proceedings before each immigration court location identified in his or her application;

(2) Any specific limitations the attorney has in providing pro bono legal services (e.g., not available to assist detained aliens or aliens with criminal convictions, or available for asylum cases only);

(3) A description of the good-faith efforts he or she made to provide pro bono legal services through an organization or pro bono referral service described in paragraph (a), (b), or (c) of § 1003.62 to aliens appearing before each immigration court location listed in the application;

(4) An explanation that any such organization or referral service is unavailable or that the range of services provided by available organization(s) or referral service(s) are insufficient to address the needs of the community;

(5) The bars of the highest courts of the states, possessions, territories, or commonwealths of the United States, or the District of Columbia, in which he or she is eligible to practice law, and that he or she is a member in good standing of each, including the attorney's bar number, if any;

(6) That he or she is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law; and

(7) That he or she is not the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2).

(e) *Applications approved before [insert effective date of final rule].* Providers whose applications to be included on the List were approved before [effective date of final rule to be inserted] must file an application under this section as follows: organizations and pro bono referral services, within one year of [effective date of final rule to be inserted]; attorneys, within six months of [effective date of final rule to be inserted]. The names of providers who do not file an application as required by this paragraph shall be removed from the List following expiration of the application time period, the removal of which will be reflected no later than in the next quarterly update.

(f) *Notice and comments.* (1) *Public notice and comment.* The names of the applicants, whether organizations, pro bono referral services, or individuals, meeting the regulatory requirements to be included on the List shall be publicly posted for 15 days after receipt of the applications by the Director, and upon request a date stamped copy of each application shall be made available for review. Any individual may forward to the Director comments or a recommendation for approval or disapproval of an application within 15 days from the last date the name of the applicant is publicly posted. The commenting party shall also include proof of service of a copy of any such comment or recommendation on the subject organization, pro bono referral service, or individual, in accordance with the definition of “service” described in § 1003.13.

(2) *Response.* The applicant has 15 days to respond from the date of service of the

comment. All responses must be filed with the Director and include proof of service of a copy of such response on the commenting party, in accordance with the definition of “service” described in § 1003.13.

7. Revise § 1003.64 to read as follows:

§ 1003.64 Approval and denial of applications.

(a) *Authority.* The Director in his discretion shall have the authority to approve or deny an application to be included on the List of Pro Bono Legal Service Providers. The Director may request additional information from the applicant to determine whether the applicant qualifies to be included on the List.

(b) *Decision.* The applicant shall be notified of the decision in writing. The written notice shall be served in accordance with the definition of “service” described in § 1003.13. The written notice shall be served on the applicant at the address provided on the application unless the applicant subsequently provides a change of address pursuant to § 1003.66.

(1) *Denials.* If the application is denied, the applicant shall be given a written explanation of the grounds for such denial, and the decision shall be final. Such denial shall be without prejudice to file another application at any time after the next quarterly publication of the List.

(2) *Approval and continuing qualification.* If the application is approved, the applicant’s name will be included on the List at the next quarterly update. Every three years from the date of approval, a provider must file with the Director a declaration, under penalty of perjury, stating that the provider remains qualified to be included on the List under paragraphs (a), (b), (c), or (d) of § 1003.62. The declaration must include alien registration numbers of clients in whose cases the provider rendered pro bono legal services under §§ 1003.62(a)(1), (b)(2), or (d)(2),

representing at least 50 hours of pro bono legal services each year since the provider's most recent such declaration, or since the provider was included on the List, whichever was more recent. If a provider fails to timely file the declaration or declares that it is no longer qualified to be included on the List, the provider's name will be removed from the List at the next quarterly update. Failure to file a declaration within the applicable time period does not prohibit the filing of a new application to be included on the List.

8. Revise § 1003.65 to read as follows:

§ 1003.65 Removal of a provider from the List.

(a) *Automatic removal.* If the Director determines that an attorney on the List is the subject of a final order of disbarment under § 1003.101(a)(1), or an order of suspension under § 1003.101(a)(2), then the Director shall:

(1) Remove the name of the attorney from the List no later than at the next quarterly update; and,

(2) Notify the attorney of such removal in writing, at the last known address given by the provider.

(b) *Requests for removal.*

(1) Any provider may, at any time, submit a written request to have the provider's name removed from the List. The written request may include an explanation for the voluntary removal. Upon such written request, the name of the provider shall be removed from the List, and such removal will be reflected no later than in the next quarterly update.

(2) Any provider removed from the List at the provider's request may seek reinstatement to the List upon written notice to the Director. Any request for reinstatement must include a new

declaration of eligibility, as set forth under § 1003.63(b), (c) or (d). Reinstatement to the List is at the sole discretion of the Director. Upon the Director's approval of reinstatement, the provider's name shall be included on the List no later than in the next quarterly update. Reinstatement to the List does not affect the requirement under § 1003.64(b)(2) that a provider submit a new declaration of eligibility every three years from the date of the approval of the original application to be included on the List.

(c) *EOIR inquiry in response to complaints.* If EOIR receives complaints that a particular provider on the List may no longer be accepting new pro bono clients, the Director may send a written inquiry to a provider noting that EOIR has received complaints with regard to the provider's acceptance of pro bono clients and allowing an opportunity for the provider to state whether the provider is continuing to comply with the regulations in this subpart or, if appropriate, whether the provider wishes to request voluntary removal from the List as provided in paragraph (b). The Director may remove a provider from the List for failure to respond to a written inquiry issued under this paragraph within 30 days or such additional time period stated by the Director in the written inquiry.

(d) *Procedures for removing providers from the List.* The following provisions apply in cases not covered by paragraphs (a), (b) or (c).

(1) *Grounds.* A provider shall be removed from the List if it, he, or she:

(i) Fails to comply with § 1003.66;

(ii) Has filed a false declaration in connection with an application filed pursuant to § 1003.63;

(iii) Improperly uses the List primarily to advertise or solicit clients for compensated legal services; or,

(iv) Fails to comply with any and all other requirements of this subpart.

(2) *Notice.* If the Director determines that a provider falls within one or more of the enumerated grounds under paragraph (d)(1) of this section, the Director shall promptly notify the provider in writing, at the address last provided to the Director by the provider, of the Director's intention to remove the name of the provider from the List.

(3) *Response.* The provider may submit a written answer within 30 days from the date the notice is served, as described in § 1003.13. The provider must establish by clear and convincing evidence that the provider continues to meet the qualifications for inclusion on the List, by declaration under penalty of perjury as to the provider's continued compliance with eligibility requirements under this subchapter, which must include alien registration numbers of clients in whose cases the provider rendered pro bono legal services under § 1003.62(a)(1), (b)(2), or (d)(2), representing at least 50 hours of pro bono services each year since the provider's most recent declaration under § 1003.64(b)(2), or since the provider was included on the List, whichever was more recent.

(4) *Decision.* If, after consideration of any response submitted by the provider, the Director determines that the provider is no longer qualified to remain on the List, the Director shall:

(i) Remove the name of the provider from the List no later than in the next quarterly update; and

(ii) Notify the provider of such removal in writing, at the address last provided to the Director by the provider.

(5) *Disciplinary Action.* Removal from the List pursuant to § 1003.65(a), (b), (c) or (d) shall be without prejudice to the authority to discipline a practitioner under EOIR's rules and

procedures for professional conduct for practitioners listed in 8 CFR part 1003, subpart G.

9. Add § 1003.66, to read as follows:

§ 1003.66 Changes in address or status.

All entities or persons with a pending application under this subpart, and all providers on the List, are under a continuing obligation to notify the Director, in writing or by whatever electronic notification process approved by the Director, within ten business days, of any:

- (a) Change of address;
- (b) Change of telephone number;
- (c) Change in eligibility under § 1003.62;
- (d) Change regarding specific limitations to providing pro bono legal services under § 1003.63;
- (e) Receipt of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2) by the provider (if an attorney), or by an attorney or representative providing pro bono services before EOIR on behalf of the provider; or
- (f) Change in professional status, including bar membership or any order suspending, enjoining, restraining, disbaring, or otherwise restricting the provider (if an attorney), or an attorney or representative providing pro bono services before EOIR on behalf of the provider, in the practice of law.

PART 1240 – PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

10. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105-100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105-277, (112

Stat. 2681).

11. In § 1240.10, revise paragraphs (a)(2) and (a)(3), to read as follows:

§ 1240.10 Hearing

(a) * * *

(2) Advise the respondent of the availability of pro bono legal services for the immigration court location at which the hearing will take place, and ascertain that the respondent has received a list of such pro bono legal service providers.

(3) Ascertain that the respondent has received a copy of appeal rights.

* * * * *

12. Amend § 1240.32 in paragraph (a) by removing the words “Government, and of the availability of free legal services programs qualified under 8 CFR part 1003 and organizations recognized pursuant to § 1292.2 of this chapter located in the district where his or her exclusion hearing is to be held; and shall ascertain that the applicant has received a list of such programs” and adding, in their place, the words “Government; advise him or her of the availability of pro bono legal services for the immigration court location at which the hearing will take place, and ascertain that he or she has received a list of such pro bono legal service providers”.

13. Amend § 1240.48 in paragraph (a) by removing the words “free legal services programs qualified under 8 CFR part 1003 and organizations recognized pursuant to § 1292.2 of this chapter, located in the district where the deportation hearing is being held; ascertain that the respondent has received a list of such programs” and adding, in their place, the words “pro bono legal services for the immigration court location at which the hearing will take place; ascertain that the respondent has received a list of such pro bono legal service providers”.

PART 1241 – APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

14. The authority citation for part 1241 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4).

15. Amend § 1241.14 in paragraph (g)(3)(i) by removing the words “a list of free legal service providers,” and adding, in their place, the words “the List of Pro Bono Legal Service Providers for the immigration court at which the hearing is being held”.

_August 4, 2014_____
Date

Eric H. Holder, Jr.
Attorney General

[FR Doc. 2014-21686 Filed 09/16/2014 at 8:45 am; Publication Date: 09/17/2014]